Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors v Karpal Singh

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 01-16-1989
HASHIM YEOP A SANI CJ (MALAYA), MOHAMED AZMI AND GUNN CHIT TUAN SCJJ
21 NOVEMBER 1991

Civil Procedure *— Costs — Application for declaration — Matters becoming academic — Costs depend on discretion of judge*

Civil Procedure *— Declaration — Application for — Matters becoming academic — Application for costs — Discretion of court*

In this case the respondent had sought declarations pertaining to the validity of the order of detention under the Internal Security Act 1960 against the respondent and also the validity of the restrictions and conditions imposed on the respondent under the Act. The originating summons was taken out after the detention order was suspended but before the detention order was cancelled. However, when the originating summons came before the learned judge, the detention order had been cancelled. The matter had therefore become academic. The respondent asked for costs but senior federal counsel on behalf of the appellants raised two preliminary objections. The learned judge dismissed the preliminary objections but made no other order.

Held, allowing the appeal:
The question of costs to be awarded in any particular case depends on the discretion of the judge. There were sufficient material before the learned judge and he could have exercised his discretion. The case is therefore remitted back to the learned judge for the appropriate orders to be made.

[Bahasa Malaysia summary

Di dalam kes ini responden telah memohon deklarasi mengenai sahnya perintah tahanan di bawah Akta Keselamatan Dalam Negeri 1960 terhadap responden dan juga sahnya sekatan dan syarat-syarat yang dikenakan ke atas responden di bawah Akta itu. Saman permulaan telah dikeluarkan selepas perintah tahanan itu digantung akan tetapi sebelum perintah itu dibatalkan. Akan tetapi apabila saman permulaan itu didengar oleh hakim yang arif, perintah tahanan itu sudah dibatalkan. Oleh kerana itu perkara itu telah menjadi tidak praktis lagi. Responden telah memohon kos akan tetapi peguam kanan persekutuan kanan telah menimbulkan dua bantahan permulaan. Hakim yang arif telah menolak bantahan itu akan tetapi tidak membuat apa-apa perintah lain.

Diputuskan, membenarkan rayuan itu:
Soal kos yang diberi di dalam mana-mana kes adalah bergantung kepada budibicara hakim. Terdapat keterangan yang mencukupi di hadapan hakim yang arif dan beliau boleh menggunakan budibicaranya. Kes ini dihantar balik kepada hakim yang arif supaya beliau membuat perintah-perintah yang sesuai.]

Notes
For cases on discretion of court to award costs, see 2 *Mallal's Digest* (4th Ed) paras 616–622.

Cases referred to
1 *Sun Life Assurance Company of Canada v Jervis* [1944] AC 111 (refd)
2 *Loknath Padhan v Birendra Kumar* AIR 1974 SC 505 (refd)
3 *Mohamed Noor bin Othman & Ors v Haji Mohamed Ismail bin Haji Ibrahim & Ors* [1988] 3 MLJ 82 (refd)
4 *Nkondo & Gumede v Minister of Law and Order* (1986) 2 SALR 756 (distd)

Legislation referred to
Internal Security (Amendment) Act 1988 s 5(2)

Appeal from: Originating Summons No 24–94 of 1989 (High Court, Penang)

Zaleha Zahari (Senior Federal Counsel) for the appellant.
Respondent in person.

Cur Adv Vult

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): This appeal is against the ruling of the learned judge (Wan Adnan J) sitting in the High Court, Penang on the preliminary objections raised on behalf of the appellants. Except for the ruling, no other order was made by the learned judge.

In his originating summons the respondent had sought for certain declarations from the High Court pertaining to the validity of the order of detention under the Internal Security Act 1960 ('the Act') of which the respondent was the subject and also the validity of the restrictions and conditions imposed on the respondent under the Act.

The background facts may be briefly stated as follows. The respondent was detained under the Act vide a detention order dated 18 December 1987 issued by the Minister for Home Affairs pursuant to s 8(1) of the Act. Subsequently on 25 January 1989 an order under s 10 of the Act was made suspending the detention order subject to certain conditions. The respondent was then released from detention. Then by an order dated 19 April 1989 the detention order was cancelled, thus removing all the conditions imposed. The originating summons was taken out on 10 February 1989,

that is, after the detention order was suspended but before the detention order was cancelled.

The originating summons came before the learned judge on 25 April 1989, that is six days after the detention order was cancelled. At the commencement of the proceeding the respondent asked for costs but learned senior federal counsel on behalf of the appellants raised two preliminary objections which were enumerated by the learned judge in his grounds of judgment as follows:

(1) The matter had by the time it came before the learned judge become academic and therefore the originating summons should be struck out with no order as to costs; and/or

(2) Purporting to rely on s 5(2) of the Internal Security (Amendment) Act 1988 there was no right on the part of the respondent to bring the action and therefore the application should be dismissed.

The learned judge overruled both the preliminary objections and held that before he could exercise his discretion on costs he had to hear the merits of the application in the originating summons. Thus this appeal.

We will first deal with the second preliminary objections which is the more simple of the two objections. In our view the learned judge was perfectly correct in rejecting the argument of learned senior federal counsel on this point. The argument is not supported by the plain reading of s 5(2) of the amendment Act. As the marginal note to s 5 of the amendment Act clearly states, the whole section deals with 'validation of detention orders and detentions, and indemnity'.

Looking at the language of s 5 it is clear to us that sub-s (1) provides for the omnibus validation of certain orders made during the period between the date of commencement of the Act and the commencement of the amendment Act. Subsection (2) of s 5 is, as the learned judge pointed out, restricted to actions, suits, prosecutions or other legal proceedings for on account of or in respect of anything lawfully done in relation to the detention order or the detention declared lawful and valid under sub-s (1) of s 5. Section 5(2) of the amendment Act has no general application and certainly does not apply to this case.

As regards the first preliminary objection it is our view that the matter had indeed, by the time the originating summons came before the learned judge, become academic. There was no living issue before the learned judge. There was no longer any lawful recipient of any benefit of any declaration sought in the originating summons. Cases cited by the learned judge (*Sun Life Assurance Company of Canada v Jervis*,[1] *Loknath Padhan v Birendra Kumar*[2] and *Mohamed Noor bin Othman & Ors v Haji Mohamed Ismail bin Haji Ibrahim & Ors*[3]) constitute ample authorities for the court not to act in vain. The respondent had by then no real interest in the declarations. It will be a complete waste of judicial time if the court were to deal with the merits of the application in the originating summons solely to determine the question of costs.

Much reliance was placed on the South African case of *Nkondo & Gumede v Minister of Law and Order*,[4] in particular on a passage which appears in the judgment of Rabie CJ in the appellate court at p 769, a xerox

copy of which was provided by Mr Karpal Singh. Three appeals came before the appellate court and the issues in the first and third of those cases concerned the validity of notices issued by the minister purporting to act in the terms of a provision of the Internal Security Act. The lower court confirmed the validity of the notices but on appeal the notices were found to be invalid and the lower court's judgment set aside. The passage referring to the need to go to the merits before the question of costs could be decided is to be read in that context.

The question of costs to be awarded in any particular case depends on the discretion of the judge. The discretion is a judicial discretion and must be exercised according to settled principles. There must be sufficient materials for the judge to exercise his discretion so that the discretion will not appear to be exercised arbitrarily or capriciously.

In this case it is common ground that there were sufficient materials before the learned judge and he could have exercised his discretion. The learned judge has however not exercised his discretion on the question of costs.

As stated earlier, apart from overruling the preliminary objections, the learned judge did not make any other order.

The appeal is accordingly allowed and the case is remitted back to the High Court for the appropriate orders to be made. Costs in the cause.

Appeal allowed.

Reported by Prof Ahmad Ibrahim